
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, NW
Washington, D.C. 20036

Case No. 85-ERA-34

In the Matter of

THOMAS G. BASSETT,
Complainant

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent

DANTE M. SCACCIA, ESQ. and
ROBERT A. TRAYLOR, ESQ.
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For the Complainant

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For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding to impose remedial and compensatory sanctions under Section 210 (the Employee Protection provisions) of the Energy Reorganization Act (42 U.S.C. §5851).

Statement of the Case

Under date of June 20, 1985, a so-called "whistle-blower" complaint was duly filed with the Department of Labor by Complainant against the Respondent, his Employer.* It was alleged therein that Respondent had violated Section 210 of the Act by giving Complainant a denigrating and discriminatory performance appraisal in retaliation for his making adverse reports in the course of his activity in the Quality Assurance program.

After investigation, the Assistant Area Director, Wage and Hour Division, issued a determination dated August 14, 1985 finding that the allegations of discrimination under the Act were without merit. Thereafter, Complainant duly appealed by telegram dated August 16, 1985 to the Chief Administrative Law Judge. A hearing thereon was held by the undersigned on September 5, 1985 in Syracuse, New York. Thereafter briefs were filed and the hearing record was closed upon receipt of the transcript on September 18, 1985.

Findings of Fact

1. At all times since 1965, Complainant was, and still is, employed full-time by Respondent.
2. Respondent is a licensed nuclear power plant operator and the holder of a permit to construct a further nuclear power plant. Its plant at Nine Mile Point, Unit I in Oswego, N.Y. is in operation, and its nearby Unit 2 is under construction.
3. Complainant holds the position of senior engineer in Respondent's Quality Assurance Department.

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4. Complainant's lead senior engineer is Richard Fassler and his supervisor is William Connolly. The manager of the Quality Assurance Nuclear Division is David Palmer.
5. For the years 1980 through 1984, Complainant's former supervisors had given him performance ratings characterized overall as Commendable or Satisfactory. On a comparative basis, his ratings had been in the next to the highest level and with one possible exception, had warranted promotion or increase in salary.
6. In July, 1984, Complainant had been assigned to work under Fassler and Connolly, who in May of that year gave him the performance rating which is the subject of the complaint herein.

7. The evaluation of May 24, 1983, graded Complainant at a Level III, which is the next to the highest category and is described as follows:
"EMPLOYEE ACHIEVES RESULTS WHICH ARE EXPECTED - FUNCTIONS WHICH ARE NORMAL TO THE POSITION ARE PERFORMED IN A COMPETENT MANNER - MAY EXCEED REQUIREMENTS IN SOME AREAS - CONTINUALLY BECOMING MORE EFFECTIVE."
8. In consequence of said performance rating, Complainant received a salary increase of 5.3 percent, which was calculated pursuant to Respondent's salary adjustment guidelines and was the maximum increase that could have been authorized short of a Level IV rating.
9. Though generally favorable, the performance rating contained a comment ascribed to Palmer that indicated his meeting of expectations in regard to the goal associated with procedures was "borderline", adding that his performance will have to improve or an unsatisfactory rating may result.

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10. Complainant filed objections to the performance rating and subsequently filed his complaint that it was discriminatory and violative of the Employee Protection provisions of the Act.
11. In previous years, Complainant had been a member of auditing teams and had been a Quality Assurance Supervisor. In the course of his duties, he had made a number of audit reports calling management's attention to deficiencies or conditions that appeared to require correction.
12. Following one such report in 1981, Complainant had in effect been barred from working at Nine Mile Point Unit 2, although he was unaware of such action until long after the restriction had been lifted.
13. In or about the month of October, 1984, Complainant had given written and oral statements to the Nuclear Regulatory Commission (NRC) charging Respondent's management with ignorance of, or negative attitude toward, the quality assurance program and with jeopardizing the effectiveness of such program.
14. NRC did not disclose to Respondent the identity of its informants, and there is no evidence indicating that Fassler, Connolly or Palmer had any knowledge of Complainant's statements to NRC at the time of the May, 1985, performance evaluation.
15. Complainant discussed the evaluation with Fassler and Connolly, and under date of June 10, 1985, submitted to them a detailed written response.

Conclusions of Law

Preliminarily it must be pointed out that a complaint under Section 210 must be filed within 30 days after the alleged discrimination in violation of the Act. 42 U.S.C. § 5851(b); 29 C.F.R. § 24.3(b). Since it is undisputed that the only discrimination alleged herein is the May 24, 1985 performance evaulation, and since there is no doubt that the complaint herein was filed on June 20, 1985, no question of untimeliness or of statute of limitations is presented. Reference to acts prior to May 24, 1985 (such as previous

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performance ratings and previous audit reports) are relevant and material in establishing the employment background and/or purported motivation, and are clearly admissible.

To establish a *prima facie* case of retaliatory discrimination under Section 210, a complainant must show (1) that he engaged in an activity protected by Section 5851; (2) that an adverse employment action occurred; and (3) that the participation in the protected activity was a motivating factor in the adverse employment decision. See *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983); *Seraiva v. Bechtel Power Corporation*, 84-ERA-24 (July 5, 1984).

With respect to a protected activity, it is clear from the evidence that in addition to his complaints to the NRC, Complainant also actively participated in quality assurance audit reports that resulted in unfavorable reports to management. Consequently, even if the statements made to the NRC in October, 1984 were not known to any of the persons who prepared or approved the performance evaluation, the internal audit reports to management were not only brought to the attention of the NRC, but were sufficient *per se*. Section 5851 has been expressly held to protect quality control inspectors from retaliation based on internal safety and quality control complaints. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Dunham v. Brown & Root, Inc.*, 84-ERA-1 (November 30, 1984), affirmed and adopted by the Secretary June 21, 1985; see also *Consolidated Edison Co. of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982).

Unfortunately, however, there is little or no evidence that an adverse employment action occurred. Complainant's allocation to a Level III category was simply a continuation of the *status quo*. Not only was it in line with his previous ratings, but it demonstrated that rather than being singled out for discriminatory treatment, he was maintaining his status among 90 percent of his co-workers who received similar grading. Thus the proof shows neither disparate treatment nor disparate impact; hence no discrimination. See *Teamsters v. United States*, 431 U.S. 324, 335-36, n. 15 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973).

Moreover, Complainant was recommended for and received

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a 5.3 percent wage increase, which was the maximum raise that could be awarded to anyone in his job classification with a Level III rating. Thus he was in no sense downgraded with respect to position, status, authority or salary. Certainly the performance evaluation had no adverse economic effect; nor did it involve any change in working conditions.

What appears to be the gravamen of the complaint is an unfavorable comment in the section of the evaluation dealing with Results Achieved vs. Results Expected. With respect to one of the three responsible areas upon which Complainant was rated in that section (Coordination and resolution of comments for all QA procedures for the manager of nuclear operations), his rating was said to be considered borderline between "met expectations" and "did not meet expectations"; and it was further said that performance will have to improve or an unsatisfactory rating may result. That was not a direction to cease a protected activity under threat of discharge or disciplinary action (cf. *Dunham v. Brown & Root, Inc., supra*), but was a bluntly worded caution that better performance in that area was expected. That can hardly be deemed to constitute harassment.

Complainant expresses some anxiety about the possibility that the above negative comment might affect his future salary and opportunities for promotion or perhaps even retention, but no evidence was proffered to substantiate such fears. It has not been shown that Complainant has been harmed to date, and any possible prejudice in the future is on this record purely speculative. If every critical comment in a performance evaluation were held to constitute an adverse employment action, employers would be unable to direct attention to areas of an employee's work that needed improvement, and performance evaluations would diminish to the point of being nothing more than numerical ratings having no constructive value to either employer or employee. In short, I am unable to find that the comment in question constitutes an adverse employment action.

In view of the foregoing, I am constrained to conclude that Complainant has failed to make out a *prima facie* case. It is therefore unnecessary to consider whether the protected activity was a motivating factor in the evaluation.

RECOMMENDED ORDER

For the reasons above stated, I recommend that the proceeding be dismissed on the merits.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: OCT 17 1985
Washington, D.C.

RJF/mml

[ENDNOTES]

[*] Although the complaint also sought relief against Management Anaylsis Company (MAC), it is not disputed that at all relevant times, Respondent was Complainant's only

employer. Consequently Respondent was the sole and exclusive entity to which the provisions of Section 210 could be applied herein. See *Orr v. Brown & Root, Inc.*, 85-ERA-6 (May 14, 1985). As a result, MAC was not officially named as a party to this proceeding, did not appear herein, and any claim asserted against it was severed by my direction at the outset of the hearing.